Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

REINHOLD MARSONER,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do principles of international comity preclude a United States court from enforcing an order which compels an Austrian citizen residing in the United States to violate the sovereign laws of Austria?

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OPINIONS BELOW

Petitioner seeks review of the opinion filed on November 7, 1994, by the United States Court of Appeals for the Ninth Circuit, which affirmed a district court order finding petitioner in contempt for refusing to sign a consent directive before the grand jury as directed by the district court. That opinion is reported at 40 F.3d 959, and is reproduced as Appendix A in the separate Appendix to this petition.

STATEMENT OF JURISDICTION

The United States District Court for the District of Arizona exercised jurisdiction in this matter under 28 U.S.C. § 1826 on the government's motion to compel petitioner to sign a consent directive before a federal grand jury. The district court entered a Memorandum Decision and Order on March 31, 1994, directing petitioner to sign the consent directive attached to the Order. (Appendix B.) Upon petitioner's

refusal to sign the consent directive, the district court entered an Order dated May 2, 1994, finding petitioner in civil contempt, and imposing a fine and incarceration until petitioner purged his contempt. (Appendix C.) The district court stayed the fine and sanction of incarceration pending appeal to the Ninth Circuit Court of Appeals and application for writ of certiorari to the United States Supreme Court. (Id.)

Petitioner filed an appeal to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291. On June 3, 1994, the court of appeals entered an order [published opinion to follow] affirming the district court's order. (Appendix F.) The appellate court's opinion for publication was filed on November 7, 1994. (Appendix A.)

Petitioner filed a petition for rehearing, with suggestion for rehearing en

banc. On February 2, 1995, the appellate court entered an order denying rehearing en banc. (Appendix D.) On motion of petitioner, the appellate court stayed the mandate of the court until March 13, 1995. On April 26, 1995, the appellate court recalled its mandate and amended its order of February 2, 1995, *nunc pro tunc*, denying the petition for rehearing and rejecting the suggestion for rehearing en banc. (Appendix E.)

This petition for certiorari was filed on May 2, 1995, within 90 days of the order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing.

This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves provisions of Austrian banking law (Bundesgesetzblatt, No. 63/1979, or the "1979 Banking Statute," § 23), Austria's Law on Extradition and Mutual Assistance in Criminal Matters, and the European Convention on Human Rights. The pertinent provisions of these laws are analyzed in this brief and in the underlying opinion of the United States Court of Appeals for the Ninth Circuit (Appendix at A-14, A-25, A-30, A-31 n.2, A-32 - A-33.

STATEMENT OF THE CASE

In May 1993, the Internal Revenue Service executed search warrants on the residence and business premises of Reinhold Marsoner, an Austrian citizen residing in the United States. Among the items seized were certain documents indicating that Mr. Marsoner had loans with an Austrian bank.

On January 20, 1994, Mr. Marsoner was subpoenaed before a federal grand jury to sign a compelled consent directive authorizing disclosure of the records of any bank account for which he is, was, or may be a relevant principal. (See Appendix at A-2, A-3.) The consent directive specifically authorized disclosure of bank records otherwise protected by the laws of Austria. (See Appendix at B-4.)

Mr. Marsoner appeared before the grand jury and refused to sign the consent directive, asserting his rights under the Fourth and Fifth Amendments to the United States Constitution and his rights under the laws of Austria. (See Appendix at A-3.)

The government filed a motion with the United States District Court to compel Mr. Marsoner to sign the consent directive. (See Appendix at A-3, A-4.) Mr. Marsoner filed a response in opposition, supported by the affidavits of two experts on Austri-

an law attesting to the bank secrecy laws of Austria, and a motion for an evidentiary hearing to consider the implications of Austrian law. (Id.) The court heard oral argument on the government's motion but declined to hold an evidentiary hearing. (See Appendix at A-4.) The district court's order, filed on March 31, 1994, found no violation of Mr. Marsoner's Fourth and Fifth Amendment rights, no need to consider the implications of Austrian law, and directed Mr. Marsoner to sign the consent directive on or before April 8, 1994. (Appendix at B-3.)

Mr. Marsoner appeared on April 11, 1994, and once again refused to sign the consent directive, invoking his rights under the Fourth and Fifth Amendments to the United States Constitution and the sovereign laws of Austria. (Appendix at A-4, A-5.)

The government petitioned for an order to show cause why Mr. Marsoner should not be held in contempt of the district court's order. (Appendix at A-5.) On May 2, 1994, the district court found Mr. Marsoner in civil contempt, imposed a fine of $100 and incarceration during the term of the grand jury or until Mr. Marsoner purged himself of the contempt by signing the consent directive. (Appendix C.) The court stayed the fine and incarceration pending appeal to the Ninth Circuit and application for a writ of certiorari to the United States Supreme Court. (Id. at C-2.)

Mr. Marsoner appealed to the United States Court of Appeals for the Ninth Circuit from the district court's order. Mr. Marsoner's brief raised two issues:

1. Did the district court err in failing to hold an evidentiary hearing to consider

the implications of Austrian law?

2. Can [Mr. Marsoner] be compelled to sign a consent directive waiving his Fourth and Fifth Amendment rights under the United States Constitution and his rights as an Austrian citizen?

Mr. Marsoner asked the court of appeals to remand for an evidentiary hearing on the implications of Austrian law. The government filed an answering brief and Mr. Marsoner filed a reply. On June 3, 1994, the appellate court entered an order, without opinion, which affirmed the district court's order. (Appendix F.) Pursuant to a motion filed by Mr. Marsoner, the court of appeals granted an extension to file a petition for rehearing to 14 days after publication of the court's opinion.

The appellate court's opinion for publication was filed on November 7, 1994. (Appendix A.) In a two-to-one decision, the majority found that Mr. Marsoner's execution of the consent directive is not testimonial and, therefore, does not implicate his Fifth Amendment rights. (Id. at A-8.) The majority found further that, because the documents to be produced under the consent directive have already been prepared, there is no compulsion and no Fifth Amendment implication. (Id. at A-9.)

Addressing Mr. Marsoner's Fourth Amendment claims, the majority found that an **American** depositor has no reasonable expectation of privacy in records maintained by a bank. (Id. at A-11.) The majority noted that the Supreme Court has extended that analysis to the privacy expectations of an individual depositing funds in a foreign bank. (Id. at A-12.) The majority found that the district court

erred by failing to consider the role of Austrian law in its evaluation of Mr. Marsoner's Fourth Amendment claim, but that the court of appeals could review *de novo* the impact of Austrian law on Mr. Marsoner's expectations of privacy. (Id. at A-13, A-14.) The majority found that while the Austrian banking statute generally protects banking secrets, it is not a "blanket guarantee," and that considerations of United States law dilute Mr. Marsoner's expectations of privacy. (Id. at A-15.)

Finally, the court of appeals considered whether the principles of international comity prevented the district court from enforcing its order. (Id. at A-18.) The majority found it unnecessary to evaluate the accuracy of the opinions expressed in the affidavits of the Austrian law experts proffered by Mr. Marsoner; that even if the district court order implicates Mr.

Marsoner's rights under Austrian law, international comity will not preclude its enforcement. (Id. at A-21.) The majority found that the wording of the consent directive left the Austrian courts free to decide whether the directive constitutes valid consent under Austrian law. (Id. at A-27.) The majority found it preferable to allow the Austrian courts to decide what effect to give the consent directive if the district court attempted to enforce its order with respect to Austrian bank records. (Id. at A-28.)

The Honorable Harry Pregerson dissented from the opinion affirming the district court's order. Judge Pregerson found it uncontroverted that a coerced consent would violate Austrian law (id. at A-30), and that since forcing Mr. Marsoner to sign the consent directive appears unlikely to achieve the desired result, on balance, Austria's interest in protecting its citi-

zens and regulating official acts in Austria appears to outweigh the United States' interest in obtaining Mr. Marsoner's signature (id. at A-34). Judge Pregerson found that the consent directive was designed to accomplish what could not otherwise be accomplished in Austria and that compelling Mr. Marsoner to sign the consent might be an affront to Austria, in that the coerced consent was contrary to Austrian law and apparently designed to circumvent Austrian law. (Id. at A-34, A-35.) Judge Pregerson concluded that notions of international comity preclude enforcement of the district court's coercive order. (Id. at A-36.)

Mr. Marsoner filed a petition for rehearing, with suggestion for rehearing en banc, on the grounds that compelling Mr. Marsoner to sign the consent directive under threat of incarceration and imposition of a fine violated Austrian law; incarcerating Mr. Marsoner for refusing to

sign the consent directive would violate the European Convention on Human Rights, which is constitutional law in Austria; and enforcing the district court's order would be an affront to Austria. The appellate court's *non pro tunc* order denying rehearing and rejecting a suggestion for rehearing en banc is dated February 2, 1995. (Appendix E.)

The mandate of the appellate court has been stayed until May 10, 1995. (Id.)

SUMMARY OF ARGUMENT

The uncontroverted testimony of experts on Austrian law established that compelling Mr. Marsoner to sign a consent directive authorizing disclosure of Austrian bank accounts and production of all documents in the possession of such banks under threat of incarceration and imposition of a fine would violate Austrian law and Mr. Marsoner's rights as an Austrian citizen under the European Convention on

Human Rights, which is constitutional law in Austria. It would be an affront to Austria for a United States Court to compel Mr. Marsoner to sign the consent directive, and thus sanction an attempt to circumvent the laws of Austria.

International law and principles of international comity preclude enforcement of the district court's coercive order.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT INTERNATIONAL LAW AND PRINCIPLES OF INTERNATIONAL COMITY DO NOT PRECLUDE ENFORCEMENT OF THE DISTRICT COURT'S ORDER.

This case presents the two-fold question of whether a United States court may compel an Austrian citizen to violate the laws of Austria, and more importantly, whether a United States court should sanction an attempt to circumvent the laws of Austria. Petitioner submits that the Ninth Circuit Court of Appeals erred by focusing only on the legality, under the laws of the

United States, of compelling an Austrian citizen residing in the United States to sign a consent to the disclosure of Austrian bank records. (See Appendix A at A-18.)

Although the act of compelling Mr. Marsoner's signature would take place wholly within the United States, it is designed to accomplish what could not otherwise be accomplished in Austria. The uncontroverted affidavits of Marsoner's experts on Austrian law established the following facts:

1. The absolute right of an Austrian national to financial privacy has a long history and is basic to the Austrian economic, legal and democratic system.

2. Austria has the tightest banking secrecy laws in the world. Austrian government policy makes it a priority to maintain bank secrecy and confidentiality. Austria has a vested economic interest in

maintaining the strictest bank secrecy laws possible.

3. Austrian bank secrecy is protected by statute and, in fact, has the character of constitutional law.

4. The duty to protect the bank client's secrecy extends to all who perform work for the bank on any basis, and all officials and agencies who are privy to such information.

5. Violations of banking secrecy are a criminal offense under Austrian law. Separate civil damage and injunction suits may also be filed.

6. Exceptions to banking secrecy are few, carefully circumscribed and rarely invoked. Exceptions are made for civil matters involving the probate of an estate, cases where a depositor is under the control of a guardian, providing general information about the financial position of an enterprise (unless the enterprise has

expressly forbidden giving such information), disclosures necessary to clear legal issues between the depositor and the bank, a reporting duty under the Inheritance and Gift Tax Act, disclosures to foreign authorities where international agreements so provide, and employee dismissal matters.

7. An exception to banking secrecy is made for criminal proceedings, but only for criminal proceedings commenced before Austrian courts, and only after significant, detailed procedural hurdles have been overcome. There is no exception for investigations of any kind, domestic or foreign.

8. Compelling an Austrian citizen to consent to a waiver of banking secrecy violates basic principles of Austrian and international law.

9. Austria's Law on Extradition and Mutual Assistance in Criminal Matters (the "ARHG") prohibits foreign authorities from conducting investigations or procedural

acts on Austrian territory. The only means by which foreign prosecutors may obtain Austrian bank records is to apply through or comply with the ARHG or an applicable treaty. Because there currently is no applicable treaty between the United States and Austria, the ARHG governs.

10. In general, Austrian banking laws require the **voluntary** written consent of the depositor before any information will be disclosed by an Austrian bank. A coerced consent to disclosure of Austrian banking information would violate Austrian law.

In the face of these uncontroverted facts, the court of appeals found it unnecessary to determine whether compelling Mr. Marsoner to sign the consent directive would violate Austrian law. (Appendix A at A-21.) The court totally disregarded the issue of whether the district court's order violates Austrian law. Instead, the court

engaged in the fiction that because the district court's order itself does not compel any bank, official, employee, or any other third person to produce bank records (id. at A-27), Mr. Marsoner may be compelled under threat of incarceration to violate the sovereign laws of Austria. The court of appeals erroneously found that the consent directive authorized and directed "unspecified banks" to disclose information and produce documents. (Id.) The obvious and only purpose of the consent directive is to obtain disclosure of information concerning Mr. Marsoner's Austrian bank accounts, information which the government, based upon its investigation, believes to exist. This fact distinguishes the consent directive presented to Mr. Marsoner from the directive at issue in Doe v. United

States, 487 U.S. 201, 207 (1988).[1] Moreover, this Court has already established that an American depositor has no reasonable expectation of privacy in bank records. United States v. Miller, 425 U.S. 435, 442 (1976); United States v. Payner, 447 U.S. 727, 732 n.4 (1980). As the testimony of Mr. Marsoner's Austrian law experts established, the protections guaranteed with respect to the Austrian bank accounts of Austrian citizens are quite a different matter. It is necessary to obtain Mr. Marsoner's written consent to disclosure of Austrian bank records.

The court of appeals had evidence that Austria's Law on Extradition and Mutual Assistance in Criminal Matters (hereinafter the "ARHG") prohibits foreign authorities

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[1] In Doe the court was not called upon to address the international comity questions implicated by the government's attempt to overcome protections afforded by the laws of another nation. Id. at 218-19 n.16.

from conducting investigations or procedural acts on Austrian territory. (See Appendix A at A-32.) The only way foreign prosecutors may obtain Austrian bank records is to apply through the ARHG or an applicable treaty. (Id.) There currently is no applicable treaty between the United States and Austria; therefore, the ARHG governs. (Id.) No legal assistance from Austria is possible under the ARHG if the claimed violation of foreign law involves taxes or customs law. (Id. at A-33.) As Judge Pregerson observed in his dissenting opinion, "[c]ommon sense supports the view that Austrian courts are unlikely to enforce the consent. To do so would be akin to endorsing a violation of the ARHG." (Id. at A-34.)

Moreover, incarcerating Mr. Marsoner as punishment for refusing to sign the consent directive authorizing release of Austrian bank records violates the European

Convention on Human Rights ("ECHR"), which is considered constitutional law in Austria. (Id. at A-30.) Austria prohibits the use of coercion or threats to obtain evidence. (Id.) Accordingly, an Austrian court is likely to interpret Mr. Marsoner's compelled consent as violating the ECHR. (Id.)

In the circumstances of this case it was error for the court of appeals to leave the determination of the effectiveness of Mr. Marsoner's compelled consent to the Austrian courts, and, in effect, sanction an attempt to circumvent the laws of Austria. The court's reliance on In re Grand Jury Proceedings (Yanagihara), 709 F. Supp. 192 (C.D. Cal. 1989), when discussing its preference that Austrian courts determine the validity of the consent is misplaced. The appellant in Yanagihara failed to show that compelling his consent was inconsistent with Swiss law. Id. at 196. The

uncontroverted testimony presented in this case establishes that compelling Mr. Marsoner's consent is inconsistent with Austrian law. See United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 343-344 (7th Cir. 1983) (expert testimony in the form of affidavits, letters and translations accepted as evidence of Greek law relative to bank secrecy).[2] Moreover, the uncontroverted testimony in this case establishes that the only means by which a United States prosecutor could obtain Austrian bank records is to apply through the ARHG, and in this case, it would be a violation of the ARHG to provide the bank records.

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[2] In First Nat'l Bank of Chicago, the Seventh Circuit declined to enforce an Internal Revenue Service summons which would compel violation of Greek bank secrecy laws. This decision raises a possible issue of conflict between the Seventh and Ninth Circuits.

It is submitted that under the Restatement (Third) of Foreign Relations Law § 403 (1987)[3], reasonableness is "an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe." The importance of bank secrecy to Austria, the extent to which bank secrecy is consistent with the traditions of Austrian law, and the existence of justified expectations of Austrian citizens that their bank records will be protected all support the reasonableness of finding that international comity precludes enforcement of the district court's coercive order. Moreover, it would be an affront to Austria for a United States court to compel an action in an attempt to circumvent the laws of Austria.

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[3] Section 403 of the Restatement (Third) is cited in its entirety at A-23 to A-24 of the Appendix to this Petition, and in the interests of brevity is not repeated here.

See In re Sealed Case, 825 F.2d 494, 498-99 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987) (it might be an affront to the United States for a "foreign court . . . to compel someone to violate our laws within our borders").

The dissenting opinion of Judge Pregerson correctly analyzes the issues which the majority opinion failed to address, or dismissed as irrelevant. On balance, Austria's interest in protecting its citizens and regulating official acts in Austria outweighs the United States' interest in obtaining Mr. Marsoner's signature on the consent directive. Accordingly, principles of international comity preclude enforcement of the district court's coercive order.

CONCLUSION

For all of the above reasons, petitioner respectfully requests this Court to grant this certiorari petition to address

the important issue of international law presented here and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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